IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

DEANNA DWYER, INDIVIDUALLY AND AS NEXT FRIEND FOR BLAKE DWYER, A MINOR	§	
v.	§	**CASE NO. 4:09-CV-00198-MHS-ALM**
CITY OF CORINTH, TEXAS, A TEXAS HOME RULE CITY, DEBRA BRADLEY, CHIEF OF POLICE OF THE CITY OF CORINTH, KEVIN TYSON, A POLICE OFFICER FOR THE CITY OF CORINTH, CRAIG HUBBARD, A POLICE OFFICER FOR THE CITY OF CORINTH, CARSON CROWE, A POLICE OFFICER FOR THE CITY OF CORINTH, AND TASER INTERNATIONAL, INC.	§	

DEFENDANTS' MOTION FOR ATTORNEYS' FEES AND COSTS

TO THE HONORABLE JUDGE OF SAID COURT

DEFENDANTS, City of Corinth, Texas, Chief Debra Walthall (Bradley), Officer Carson Crowe and Officer Craig Hubbert and files this their Motion for Attorney's Fees pursuant to FEDERAL RULE OF CIVIL PROCEDURE 54(d)(2), and would respectfully show this Honorable Court the following:

I. PROCEDURAL AND FACTUAL BACKGROUND

1. On or about July 17, 2007, paramedics responded to a 911 call where Plaintiff, a sixteen-year-old boy, had suffered a seizure. Plaintiff had spent the night at the home of a friend and suffered the seizure shortly after waking. When the paramedics arrived, Plaintiff was in an upstairs bedroom, seated on the floor. Plaintiff was conscious, but the paramedics did not necessarily consider Plaintiff responsive. When the paramedics attempted to place Plaintiff on a

gurney, Plaintiff became combative and would not conform to orders from the paramedics. Plaintiff continually attempted to get off the gurney. Plaintiff flailed wildly and resisted any attempts by the paramedics to calm him and physically subdue him as they attempted to transport him down the stairs. Plaintiff hit one of the paramedics in the face, although the parties dispute whether this was intentional. The paramedics found Plaintiff to be very difficult to control physically.

2. The paramedics described Plaintiff as violent, combative, and massively strong. They were able to communicate with Plaintiff somewhat. Plaintiff told them that if they let him go, he would relax on the gurney. However, as soon as the paramedics loosened their grip on Plaintiff, he would try to get off the gurney and began fighting them again. Plaintiff does not dispute that he was uncooperative and resisting the paramedics, but he does not remember any of the events. He acknowledges that he was "starting to freak out," and it is not unusual for him to be uncooperative and noncompliant in the time period immediately following a seizure.

3. At some point, a marijuana pipe was found. It is undisputed that Plaintiff had smoked marijuana the night before. The paramedics became concerned that they may be dealing with a drug overdose. The paramedics thought that if the marijuana was laced with, or dipped in, another drug, it might explain Plaintiff's resistance and the difficulty in controlling him. Because the paramedics were having such a difficult time restraining Plaintiff, the decision was made to contact the police.

4. City of Corinth police officers Defendant Kevin Tyson ("Tyson"), Defendant Craig Hubbert ("Hubbert"), and Defendant Carson Crow ("Crow") responded to the scene. When the officers arrived, Plaintiff was downstairs and the paramedics were struggling to secure him to the

gurney in order to transport him to the ambulance. The officers ordered the other teens into another room.

5. Tyson was the only officer that attempted to help the paramedics physically restrain Plaintiff and strap him on the gurney. The other officers were with the other teens in another room. According to Tyson, when he arrived, Plaintiff was resisting the paramedics and swearing and screaming at them. One of the paramedics had tried to insert an IV in Plaintiff's arm, but was unsuccessful due to Plaintiff's resistance. The IV catheter was bent and Tyson could see blood. Tyson was advised that prior to his arrival, Plaintiff had hit one of the paramedics in the face. Tyson attempted to help physically restrain Plaintiff and told him to calm down so the paramedics could help him. Tyson decided that trying to hold him down wasn't working. "So I told him to stop fighting or I was going to tase him." Tyson took the Taser out of his holster and removed the cartridge. He then test fired the Taser one time to make sure it was working. Then he once again asked Plaintiff to stop and relax. Plaintiff continued to resist. Tyson "drive stunned" Plaintiff with the Taser on the back of his arm or the back of his shoulder. When the cartridge is removed no probes are deployed, and the Taser must be touched to a person's body, which is known as "drive stunning."

6. According to Tyson, in the back of the ambulance a paramedic tried to start another IV, and Plaintiff grabbed the paramedic's chest and the paramedic yelled out in pain. Plaintiff would calm down for a few seconds and then start fighting again after each tase. Then Tyson "would reapply it trying to gain compliance." Eventually, restraints were applied to Plaintiff in the back of the ambulance. An IV was started and Plaintiff was given a sedative.

7. Defendants Tyson, Crow, Hubbert, and the City of Corinth filed motions for summary judgment on January 25, 2010. On February 10, 2010, the Court ordered (Dkt. #73) Plaintiff to

respond to Defendants' summary judgment motions no later than February 17, 2010. On February 17, 2010, Plaintiff filed a Motion to Continue Deadline to Respond to Defendants' Summary Judgment Motions (Dkt. #77) and a Motion to Continue Trial Setting (Dkt. #78). The Court granted Plaintiff's motions (Dkt. #83) and ordered Plaintiff to respond to Defendants' Motions for Summary Judgment by April 19, 2010. On April 19, 2010, Plaintiff filed a second Motion to Continue Deadline to Respond to Motions for Summary Judgment (Dkt. #85). On April 23, 2010, the Court conducted a telephonic hearing on the motion. The Court entered an Order (Dkt. #87) granting the second motion to continue and ordered Plaintiff to respond to Defendants' Motions for Summary Judgment by June 3, 2010. On June 3, 2010, Plaintiff filed a third Motion to Continue (Dkt. #93). On June 4, 2010, the Court entered an Order (Dkt. #94) ordering Plaintiff to file a response to the motions for summary judgment by June 11, 2010. On June 11, 2010, Plaintiff filed a fourth Motion to Continue (Dkt. #95), citing illness. The Court entered an Order (Dkt. #96), ordering Plaintiff to file responses by June 14, 2010. On June 16, 2010, Plaintiff filed a Response 2 (Dkt. #98) and Motion for Leave for Late Filing of Plaintiff's Response (Dkt. #97). On June 23, 2010, Defendant Tyson filed a reply (Dkt. #99). On July 12, 2010, the Court granted Plaintiff's motion for leave (Dkt. #103).

8. Plaintiff did not respond to Officers Crowe, Hubbert’s or the City of Corinth’s Motions for Summary Judgment and abandoned the failure to intervene claims. The court entered an order dismissing the claims against those officers and the City, leaving the excessive force claim for trial.

9. On October 15, 2010, a federal jury, by a unanimous verdict, entered a verdict for Sergeant Tyson, thereby vindicating him of any wrongdoing the morning of July 18, 2010. By any standard, Defendants have prevailed in this matter.

II. ENTITLEMENT TO ATTORNEY'S FEES

10. Federal Rule of Civil Procedure 54 (d)(2) provides that a party may make a motion for the recovery of attorney's fees as costs no later than fourteen days after the entry of judgment. The requesting party must specify the judgment and the statute, rule, or other grounds entitling the moving party to the award of attorneys fees and state the amount or provide a fair estimate of the amount sought. See, F.R.C.P. 54 (d)(2). Defendants are entitled to recovery of their attorney's fees as costs based on October 18, 2010 FINAL JUDGMENT in favor of Kevin Tyson against Robert Blake Dwyer and because Defendants are prevailing parties in an action under 42 U.S.C. § 1983. See 42 U.S.C. § 1988. 42 U.S.C. § 1988, which states in relevant part, "In an action or proceeding to enforce a provision of section . . . 1983 . . . of this title, . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs . . . ." The court may, in its discretion, award attorney's fees to the prevailing party in a Civil Rights Act case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in bad faith. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421, 98 S. Ct. 694, 54 L. Ed. 2d 648 (1978). The Ninth Circuit Court of Appeals has further clarified this standard, holding that attorney's fees are awardable in an action brought under § 1983 if the action was unreasonable, frivolous, meritless or without foundation, or when the plaintiff continued to litigate after it clearly became so. *Herb Hallman Chevrolet, Inc. v. Nash-Holmes*, 169 F.3d 636, 645 (9th Cir. 1999). While the *Christiansburg* standard arose in the context of a claim brought under Title VII of the Civil Rights Act ("Title VII"), the United States Court of Appeals for the Fifth Circuit has extended the *Christiansburg* standard to § 1988 actions. *White v. S. Park Indep. Sch. Dist.*, 693

F.2d 1163, 1169 (5th Cir. 1982) (noting that the purposes of § 1988 are similar to those of the Title VII attorney's fees provision).

11. Factors a court should consider in determining whether a suit was frivolous, unreasonable, or groundless include "(1) whether plaintiff established a prima facie case, (2) whether the defendant offered to settle, and (3) whether the district court dismissed the case or held a full-blown trial." *United States v. Mississippi*, 921 F.2d 604, 609 (5th Cir. 1991). As to the first factor, it has been held that because a plaintiff "did not identify an ordinance, regulation, or a well-settled custom or policy in violation of her constitutional rights," the claim was frivolous *Jumonville v. City of Kenner*, No. 06-4022, 2008 U.S. Dist. LEXIS 32413, 2008 WL 1805434, at *1 (E.D. La. Apr. 18, 2008) (granting defendants' request for attorney's fees). With regards to the second factor, an offer to settle may show that a defendant believes the case to be meritorious. *Broyles v. Texas*, No. H-08-02320, 2009 U.S. Dist. LEXIS 64080, 2009 WL 2215781, at *4 (S.D. Tex. July 23, 2009). As to the third factor, the simple dismissal of claims before trial is not sufficient to support a finding of frivolity. *Myers v. City of W. Monroe*, 211 F.3d 289, 293 (5th Cir. 2000). Finally, a court must "resist the understandable temptation to engage in post hoc reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation." *Christiansburg Garment Co.*, 434 U.S. at 421-22. Only after having determined that granting attorney's fees is appropriate does the court examine the reasonableness of the amount requested. *Broyles*, 2009 U.S. Dist. LEXIS 64080, 2009 WL 2215781, at *4.

12. Defendants assert they are entitled to attorneys' fees, in whole and in part, in light of the final disposition of this case. Primarily, Defendants state they are entitled to their attorneys' fees up to the point of the Court's ruling on the summary judgment motions. At the earliest

opportunity, Defendants presented testimony from Officers Crowe and Hubbert showing they were not involved with the use of the Taser and did not apply any force to Plaintiff, at any time. In several pleadings, Plaintiffs indicated that they would nonsuit their claims against Officers Crowe and Hubbert. However, Plaintiffs never filed an amended complaint doing so. Instead, Plaintiffs continued to press those claims and Defendants were required to prepare their summary judgment motions and continue their defense of those specific claims. Defendants do not characterize Plaintiffs' failure to file any response to the pending summary judgment motions as a voluntary dismissal and argue it is more akin to abandoning frivolous claims that had no foundation and were unreasonable. As indicated above, Plaintiffs requested multiple continuances to respond to the pending summary judgment motions but, at no time, did they take the opportunity to ask for leave to amend their complaint to dismiss those claims. Defendants argue they are entitled to their attorneys' fees, at least up until the point of time when the Court dismissed Officers Crow, Hubbert and the claims against the City.

13. Plaintiff's claims were baseless from inception. Certainly, after the point of being presented with the affidavits of Officers Crowe and Hubbert, Plaintiff was on notice that, to continue prosecuting those claims, it would be unreasonable, frivolous and without foundation. The overwhelming evidence in this case left no issue of fact on those claims. The evidence uncovered after Defendants filed their Motions for Summary Judgment even further confirms the lack of merit, and bad faith, of Plaintiffs' claims. *See Dutton v. Univ. Healthcare Sys., L.L.C.*, 136 Fed. Appx. 596, 2005 U.S. App. LEXIS 7582, *23 (5th Cir. 2005) (in affirming, indicating that the district "court noted that [the plaintiff] failed to dismiss the claim after [the defendant] suggested to her it had not merit.")

14. As a result of Plaintiff's conduct and baseless claims, Defendants seek $129,952.39 as the fair and reasonable amount of attorneys' fees and expenses, incurred to date. These fees are established by the affidavit of William W. Krueger, III, attached as Exhibit "A" and incorporated herein by reference. In addition, as set forth in Exhibit "A", Defendants seek an additional $10,000.00 if this matter is appealed to the Fifth Circuit and an additional $20,000.00 if appealed to the U.S. Supreme Court.

WHEREFORE, PREMISES CONSIDERED, and for the foregoing reasons, Defendants respectfully request that this Honorable Court grant their Motion for Attorneys' Fees and Costs and for all such other and further relief, both at law and in equity, general and special, to which Defendant may be justly entitled.

Respectfully submitted,

MCKAMIE KRUEGER, LLP

By /s/ William W. Krueger, III
WILLIAM W. KRUEGER, III
State Bar No. 11740530
bill@mckamiekrueger.com
(Lead Attorney/Attorney in charge)
CASEY S. ERICK
State Bar No. 24028564
casey@mckamiekrueger.com
2007 N. Collins Blvd., Suite 501
Richardson, Texas 75080
(214) 253-2600
(214) 253-26261 (telecopier)
ATTORNEYS FOR DEFENDANT
KEVIN TYSON

CERTIFICATE OF CONFERENCE

The undersigned counsel hereby certifies that counsel has complied with local rule CV-7(h) regarding the "meet and confer" requirement. On November 1, 2010, counsel conferred with Plaintiff's counsel regarding this motion and Plaintiff's counsel indicated that Plaintiff was opposed to the Motion.

/s/ William W. Krueger, III
WILLIAM W. KRUEGER, III

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing instrument was filed electronically in compliance with Local Rule CV-5(a) on the 1st day of November 2010, and was thus served on all counsel who have consented to electronic service.

/s/ William W. Krueger, III
WILLIAM W. KRUEGER, III